Bhavanash Sharma a/l Gurchan Singh Sharma (practicing under the name and style of Bhavanash Sharma) v Jagmohan Singh Sandhu (Allen David Martin (formerly trading under the name and style of Martech Consultants), intervener)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04(NCvC)(W)-53–02 OF 2023
NANTHA BALAN, AZMAN ABDULLAH AND COLLIN SEQUERAH JJCA
2 SEPTEMBER 2025

Legal Profession — Unauthorised person — Touting — Respondent as consultant recommended appellant as counsel and respondent to receive portion of legal fees recovered — Respondent claimed for payment against appellant being his consultancy fees pursuant to agreement — Whether claim ran afoul of provisions of ss 37 and 40 of LPA — Whether claim was touting arrangement which was void and unenforceable — Legal Profession Act 1976 ss 37 & 40

The appellant was an advocate and solicitor and practiced at the law firm named Bhavanash Sharma in Kuala Lumpur while the respondent was not an advocate and solicitor qualified under the Legal Profession Act 1976 ('the LPA'). A company named Martech Consultant's ('Martech') appointed the respondent as a 'consultant' in respect of a debt recovery dispute that the former had with a company known as E-pay. The respondent's appointment with Martech was on the following terms, amongst others: (a) Martech agreed to pay a total sum of RM20,000 as an upfront retainer fee and 10% of any sum recovered from E-pay in the dispute; (b) the respondent was required to recommend and appoint solicitors to act on behalf of Martech in the debt recovery suit; and (c) the respondent would settle the legal fees of the lawyers appointed for Martech in the suit from the sums agreed in (a). The respondent recommended the appellant to be appointed as counsel. On the basis of the appellant being appointed to act, it was agreed that the respondent would retain/be paid half of the 10% recovered by Martech from E-pay in the debt recovery suit (if so recovered) and the appellant would be paid the other half of the 10%. The appellant was also paid RM10,000 upfront for the purposes of institution of the suit. The debt recovery suit was then settled and the sum RM4.8m was to be paid to Martech as part of the settlement. The said sum was paid to the appellant's firm as Martech's solicitors and it retained 10% of the sum ie RM480,000. The respondent then demanded from the appellant his share from the 10% retained by the appellant ie RM240,000, pursuant to the previous agreement between the parties and under condition of which the appellant was appointed. The appellant denied that there was any agreement

with the respondent for the sharing of the 10% retained by the appellant from the sum paid in settlement of the debt recovery suit. The appellant further contended, in any event, that any such agreement with the respondent was illegal and void as it constituted a touting arrangement. The respondent as a result brought a claim in the sessions court against the appellant for the sum of RM240,000. The sessions court ruled in favour of the respondent and allowed the claim. On appeal to the High Court, the learned judicial commissioner upheld the decision of the sessions court. The High Court ruled that the respondent did not act as an authorised person and s 3 of the LPA was not offended and thus the agreement between the respondent and Martech was lawful and accordingly did not invalidate the agreement between the respondent and the appellant. Hence, this appeal by the appellant. The issues for consideration were: (i) whether the claim ran afoul of the provisions of ss 37 and 40 of the LPA; and (ii) whether the claim was a touting arrangement which was void and unenforceable under s 24 of the Contracts Act 1950.

Held, allowing the appeal:

(1) Section 37 of the LPA was designed to impose restrictions upon an 'unauthorised person' performing services that only an advocate and solicitor could perform. The acts and services performed by the respondent fell within the prohibition envisaged by s 37 and squarely within the description of a person engaging in legal practice. However, the respondent was not employed and acting solely for Martech as a full-time paid employee. The learned High Court judge had therefore erred in failing to appreciate that only the actions of a fully paid 'in-house' counsel was exempted under s 38(1)(d) of the LPA. Employing a purposive interpretation of s 37 of the LPA, it could hardly be denied that the section was meant for the protection of an unsuspecting public against those who engage in the practice of providing legal services but without the safeguards contained within the LPA. Therefore, the claim of the respondent ran afoul of ss 37 and 40 of the LPA (see paras 76–77, 80, 83–84 & 88–89).

(2) The arrangement entered into by the respondent where he would receive a 'consultancy fee' of half of the fees recovered from the appellant would fall under the definition of 'touting'. What the respondent sought to now recover from the appellant represented his fee in exchange for him appointing the appellant to act as the lawyer for Martech. Thus, this was a 'touting' arrangement which was prohibited by r 51 of the Legal Profession (Practice and Etiquette) Rules 1978. The decision of the sessions court and upheld by the High Court which ruled that there was no contravention of ss 37 and 40 of the LPA was a misdirection warranting appellate intervention (see paras 96 & 102–103).

[Bahasa Malaysia summary

Perayu adalah seorang peguambela dan peguamcara dan beramal di firma guaman bernama Bhavanash Sharma di Kuala Lumpur manakala responden bukan seorang peguambela dan peguamcara yang berkelayakan di bawah Akta Profesion Undang-Undang 1976 ('APU'). Sebuah syarikat bernama Martech Consultant's ('Martech') melantik responden sebagai 'perunding' berkenaan dengan pertikaian pemulihan hutang yang syarikat itu hadapi dengan sebuah syarikat bernama E-pay. Pelantikan responden oleh Martech adalah tertakluk kepada terma-terma berikut, antaranya: (a) Martech bersetuju untuk membayar sejumlah RM20,000 sebagai yuran retainer pendahuluan dan 10% daripada sebarang jumlah yang diperoleh daripada E-pay dalam pertikaian itu; (b) responden dikehendaki mencadangkan dan melantik peguamcara untuk bertindak bagi pihak Martech dalam saman pemulihan hutang; dan (c) responden akan menyelesaikan yuran guaman peguam yang dilantik untuk Martech dalam saman itu daripada jumlah yang dipersetujui dalam (a). Responden mencadangkan perayu untuk dilantik sebagai peguam. Berdasarkan lantikan perayu untuk bertindak, telah dipersetujui bahawa responden akan mengekalkan/dibayar separuh daripada 10% yang diperoleh oleh Martech daripada E-pay dalam saman pemulihan hutang (jika diperoleh) dan perayu akan dibayar separuh lagi daripada 10% itu. Perayu juga dibayar RM10,000 pendahuluan untuk tujuan memulakan saman itu. Saman pemulihan hutang itu kemudian diselesaikan dan sejumlah RM4.8 juta akan dibayar kepada Martech sebagai sebahagian daripada penyelesaian. Jumlah tersebut dibayar kepada firma perayu sebagai peguamcara Martech dan ia mengekalkan 10% daripada jumlah tersebut iaitu RM480,000. Responden kemudian menuntut daripada perayu bahagiannya daripada 10% yang dikekalkan oleh perayu iaitu RM240,000, menurut perjanjian terdahulu antara pihak-pihak dan di bawah syarat perayu dilantik. Perayu menafikan bahawa terdapat sebarang perjanjian dengan responden untuk perkongsian 10% yang dikekalkan oleh perayu daripada jumlah yang dibayar dalam penyelesaian saman pemulihan hutang. Perayu selanjutnya menegaskan, dalam apa jua keadaan, bahawa sebarang perjanjian sedemikian dengan responden adalah menyalahi undang-undang dan tidak sah kerana ia merupakan pengaturan penarik langganan. Akibatnya, responden memfailkan tuntutan di mahkamah sesyen terhadap perayu untuk sejumlah RM240,000. Mahkamah sesyen memutuskan memihak kepada responden dan membenarkan tuntutan itu. Atas rayuan ke Mahkamah Tinggi, pesuruhjaya kehakiman yang bijaksana mengekalkan keputusan mahkamah sesyen. Mahkamah Tinggi memutuskan bahawa responden tidak bertindak sebagai orang yang diberi kuasa dan s 3 APU tidak dilanggar dan oleh itu perjanjian antara responden dan Martech adalah sah dan oleh itu tidak membatalkan perjanjian antara responden dan perayu. Oleh itu, rayuan ini oleh perayu. Isu-isu untuk pertimbangan adalah: (i) sama ada tuntutan itu melanggar peruntukan ss 37 dan 40 APU; dan (ii) sama ada tuntutan itu merupakan

pengaturan penarik langganan yang tidak sah dan tidak boleh dikuatkuasakan di bawah s 24 Akta Kontrak 1950. A

Diputuskan, membenarkan rayuan:

(1) Seksyen 37 APU direka untuk mengenakan sekatan ke atas 'orang yang tidak dibenarkan' daripada melaksanakan perkhidmatan yang hanya boleh dilaksanakan oleh seorang peguambela dan peguamcara. Tindakan dan perkhidmatan yang dilaksanakan oleh responden termasuk dalam larangan yang dibayangkan oleh s 37 dan jelas dalam deskripsi seseorang yang terlibat dalam amalan undang-undang. Walau bagaimanapun, responden tidak diambil bekerja dan bertindak semata-mata untuk Martech sebagai pekerja sepenuh masa yang dibayar gaji. Hakim Mahkamah Tinggi yang bijaksana oleh itu telah terkhilaf kerana gagal menghargai bahawa hanya tindakan seorang peguam 'dalaman' yang dibayar gaji sepenuhnya dikecualikan di bawah s 38(1)(d) APU. Menggunakan tafsiran bertujuan s 37 APU, sukar untuk dinafikan bahawa seksyen itu bertujuan untuk melindungi orang awam yang tidak curiga terhadap mereka yang terlibat dalam amalan menyediakan perkhidmatan undang-undang tetapi tanpa perlindungan yang terkandung dalam APU. Oleh itu, tuntutan responden melanggar ss 37 dan 40 APU (lihat perenggan 76–77, 80, 83–84 & 88–89). B C D E

(2) Pengaturan yang dibuat oleh responden di mana beliau akan menerima 'yuran perundingan' sebanyak separuh daripada yuran yang diperoleh daripada perayu akan termasuk dalam definisi 'penarik langganan'. Apa yang ingin dituntut semula oleh responden daripada perayu mewakili yurannya sebagai balasan kerana melantik perayu untuk bertindak sebagai peguam untuk Martech. Oleh itu, ini adalah pengaturan 'penarik langganan' yang dilarang oleh k 51 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etika) 1978. Keputusan mahkamah sesyen dan dikekalkan oleh Mahkamah Tinggi yang memutuskan bahawa tiada pelanggaran ss 37 dan 40 APU adalah satu salah arah yang mewajarkan campur tangan rayuan (lihat perenggan 96 & 102–103).] F G

Cases referred to H

A Solicitor, Re [1945] 1 All ER 445, CA (refd)

Balakrishnan a/l Devaraj v Patwant Singh a/l Niranjan Singh and anor [2004] MLJU 724; [2005] 4 CLJ 210, HC (folld)

Darshan Singh Khaira v Majlis Peguam Malaysia [2021] 5 MLJ 921; [2021] 10 CLJ 497, FC (folld) I

Lee Kuang Guat (suing as the father of the deceased, Lee Chu Ling) v Chiang Woei Chien (practicing as Chiang Chambers, Advocates and Solicitors) [2021] 3 MLJ 505; [2021] 3 CLJ 237, CA (refd)

Phool Din And Ors v Unknowns, In Re AIR 1952 ALL 491, HC (refd)

Legislation referred to

Contracts Act 1950 s 24
Legal Profession Act 1976 ss 3, 36, 36(1), 37, 37(1), (2), (2A) 38(1)(d), 40
Legal Profession (Practice and Etiquette) Rules 1979 rr 51, 52

Harvinderjit Singh a/l Manjit Singh (with Harvinder Singh a/l Kulwant Singh, Bhavanash Sharma a/l Gurhcaran Singh and Chetna a/p Brijmohan) (Bhavanash Sharma) for the appellant.
Rathi a/p Jebaratnam (with Amrick Singh Sandu, Muhammad Zulzarif bin Mohd Zakuan and Kiranjeet Kaur Sidhu) (Dinesh Ratnarajah Partnership) for the respondent.
Anand Raj (with Gregory Das and Abhilaash Subramaniam) (Abhilaash Subramaniam & Co) for the amicus curiae.
Prem (Kumar Partnership) for the intervener (Allen David Martinez).

Collin Sequerah JCA:

INTRODUCTION

[1] This appeal raises matters which are of critical importance to the legal profession in that it concerns the issue of whether a person who acts on behalf of an entity to appoint external legal counsel and performs functions normally associated with an in-house legal counsel for that entity, can claim the benefit of the fruits of litigation in the form of consultancy fees on a contingency basis in the event of a successful outcome of the litigation, whether in respect of a matter resolved favourably in court or by way of an out of court settlement.

[2] Consequently, this appeal also determines whether there results from the above factual matrix, a contravention of s 37 and/or s 40 of the Legal Profession Act 1976.

PERTINENT AND MATERIAL FACTS

[3] The appellant is an advocate and solicitor of the High Court of Malaya and practices at the law firm named Bhavanash Sharma in Kuala Lumpur.

[4] The respondent is not an advocate and solicitor qualified under the Legal Profession Act 1976 ('the LPA').

[5] A company named Martech Consultant's ('Martech') appointed the respondent as a 'consultant' in respect of a debt recovery dispute that the former had with a company known as E-pay.

[6] The respondent's appointment with Martech was on the following terms, amongst others:

(1) Martech agreed to pay a total sum of RM20,000 as an upfront retainer fee and 10% of any sum recovered from E-pay in the dispute;

(2) the respondent was required to recommend and appoint solicitors to act on behalf of Martech in the debt recovery suit; and

(3) the respondent would settle the legal fees of the lawyers appointed for Martech in the suit from the sums agreed in (1) above.

[7] The respondent recommended the appellant to be appointed as counsel and Messrs Kashminder & Associates as solicitors for Martech.

[8] On the basis of the appellant being appointed to act, it was agreed that the respondent would retain/be paid half of the 10% recovered by Martech from E-pay in the debt recovery suit (if so recovered) and the appellant would be paid the other half of the 10%. The appellant was also paid RM10,000 upfront for the purposes of institution of the suit.

[9] Following the institution of the debt recovery suit by Martech against E-pay, Messrs Kashminder & Associates were discharged as the solicitors for Martech. Bhavanash Sharma (the appellant's firm) were then appointed as the solicitors for Martech in the suit.

[10] The debt recovery suit was then settled and the sum of RM4.8m was to be paid to Martech as part of the settlement.

[11] The said RM4.8m sum was paid to the appellant's firm (as Martech's solicitors). The appellant's firm retained 10% of the sum (ie RM480,000).

[12] The respondent then demanded from the appellant his share from the 10% retained by the appellant (ie RM240,000), pursuant to the previous agreement between the parties and under condition of which the appellant was appointed.

[13] Thereafter, the appellant issued an invoice to the respondent for the sum of RM250,000 stated to be in respect of past work the appellant had done for the respondent and for which he had not been remunerated.

[14] The respondent stated that the said invoice was a 'sham legal invoice' that 'sought to obtain payment for the said previous personal court matters, in which the Defendant had previously agreed to act as counsel pro bono …'.

[15] The appellant did not remit to the respondent the RM240,000 that the latter demanded.

[16] The appellant denied that there was any agreement with the respondent for the sharing of the 10% retained by the appellant from the sum paid in settlement of the debt recovery suit. The appellant further contends, in any event, that any such agreement with the respondent was illegal and void as it constituted a touting arrangement.

[17] The respondent as a result brought a claim in the sessions court against the appellant for the sum of RM240,000.

[18] The sessions court held, inter alia, as follows:

(a) there was an agreement between Martech and the respondent that 10% of the recovered sum in the debt recovery suit would be payable to the respondent;

(b) there was an agreement between the respondent and the appellant for the sharing of the 10% paid to the respondent, for appointing the appellant to act in the matter; and

(c) ultimately ruled in favour of the respondent and allowed the claim of RM240,000 with interest.

[19] On appeal to the High Court, the learned judicial commissioner upheld the decision of the sessions court.

[20] In respect of the issue of whether the appointment of the respondent with Martech had violated the Legal Profession Act 1976 ('the LPA') and the validity of the agreement between the respondent and the appellant, the High Court ruled that the respondent did not act as an authorised person in this case and s 3 of the LPA was not offended.

[21] Thus, the agreement between the respondent and Martech was lawful, and accordingly did not invalidate the agreement between the respondent and the appellant.

[22] The appellant then filed the instant appeal.

THE PARTIES CONTENTIONS

The appellant

[23] In summary, the appellant submitted that the respondent was an 'unauthorised person' as his claim for purported 'fees' for acts allegedly undertaken by him on behalf of Martech was in contravention of the provisions of the LPA.

[24] The appellant contended that the respondent had acted as an agent for Martech and he had advised Martech to commence legal proceedings against E-pay.

[25] The respondent had, in the course of that, further rendered legal advice to Martech in relation to the legal dispute between Martech and E-pay and advised that Martech had merits in its claim and that the chances of success of recovery through the filing of a legal suit was good.

[26] The respondent had also come to an arrangement as to the amount of the legal fees payable in the event of the success of the suit and also charged a consultancy fee in relation to the initiation and conduct of legal proceedings to be commenced by Martech against E-pay which also included the legal fees to be paid to the appellant.

[27] The appellant further submitted that the respondent had apportioned a percentage of the amount recoverable in respect of the suit as payment towards the respondent's consultancy fees.

[28] The respondent had arranged for the appointment and the services of solicitors and legal counsel to initiate and conduct legal proceedings on behalf of Martech.

[29] The appellant accordingly submitted that the acts of the respondent fell squarely within the unauthorised acts prohibited under s 37 of the LPA.

[30] The appellant further submitted that the acts of the respondent amounted to touting and had flouted rr 51 and 52 of the Legal Profession (Practice and Etiquette) Rules 1979 ('the LP Rules').

The respondent

[31] The respondent took the position that he was not subject to the LPA because he was not an advocate and solicitor but only a consultant to Martech.

[32] The respondent submitted that contrary to the position of the appellant that the arrangement or agreement amounts to 'touting' because the appellant

A was sharing his legal fees with the respondent, it was the correct finding by the sessions court that it was the respondent who was sharing consultancy fees with the appellant.

B **[33]** The respondent submitted that he was not appointed by the appellant to seek for clients for the appellant but it was the respondent who appointed the appellant to act as advocates and solicitors for Martech pursuant to his consultancy arrangement with the latter.

C **[34]** The respondent's claim was thus against the appellant in respect of his consultancy fees from Martech which Martech had paid to the appellant on the respondent's behalf and that it was not the appellant's legal fees which was paid by Martech to the appellant directly.

D **[35]** The respondent submitted further that the appellant was holding the respondent's consultancy fee for the sum of RM240,000 on trust which Martech had paid to the appellant.

E **[36]** The respondent emphasised that he was not seeking for a share of the appellant's legal fees but rather for his consultancy fees which Martech had paid to the appellant.

[37] The respondent therefore submitted that he had not contravened the
F LPA or r 51 of the LPA Rules.

Malaysian Bar (amicus curiae)

G **[38]** Upon the application of the Malaysian Bar ('Bar'), we granted them leave to appear as amicus curiae ('friend of the court') given that the subject matter involved provisions of the LPA.

[39] The Bar was asked to address the panel in respect of the following two issues:

H (a) whether the claim as pleaded, contravenes ss 37 and 40 of the LPA; and

(b) whether or not the claim as pleaded is a touting arrangement which is void and unenforceable under s 24 of the Contracts Act 1950.

I **[40]** The Bar unsurprisingly answered both questions and issues posed in the affirmative.

[41] The Bar premised their submissions upon the definition of who is an 'unauthorised person' within the meaning of ss 36 and 37 of the LPA.

[42] They stated that the acts performed by the respondent such as providing legal advice generally, drafting and vetting contracts and authorisation documentation, giving advice of the prospects of legal success by the institution of legal suits and providing the service of suggesting and placing an advocate and solicitor at the disposal of Martech, all fell within the acts that are regularly performed by a qualified advocate and solicitor and the respondent therefore had contravened s 37 of the LPA.

[43] The Bar also submitted that the arrangement that the respondent would be paid half of the 10% recovered by Martech from E-pay in the debt recovery suit if successfully recovered, and that the appellant would be paid the other half of the 10%, had also resulted in the contravention of s 40 of the LPA.

[44] The Bar also submitted that the respondent had also infringed r 51 of the LP Rules for touting.

The applicant intervener Allen David Martinez (formerly trading under the name and style of Martech Consultants (Business Registration No 200703222582/0011732818-A)

[45] The panel had earlier given leave for Allen David Martinez (formally trading under the name and style of Martech Consultants) to intervene in the appeal proceedings albeit only in respect of the issue of consequential orders to be made in the event this court allows the appellant's appeal.

ANALYSIS AND FINDINGS

[46] After hearing submissions of parties and also hearing the views of the Malaysian Bar as amicus curiae and considering the factual matrix of the case, we find that there are two main issues requiring determination in this appeal.

[47] Firstly, whether the claim as pleaded runs foul of the provisions of ss 37 and 40 of the Legal Profession Act 1976 ('the LPA').

[48] Secondly, whether or not the claim as pleaded is a touting arrangement which is void and unenforceable under s 24 of the Contracts Act 1950.

Whether the claim as pleaded runs foul of the provisions of ss 37 and 40 of the LPA?

[49] It is pertinent in this regard to examine the position of the law with regard to persons who are not authorised within the meaning of the LPA.

[50] In this regard, s 36(1) which contains a definition of an 'unauthorised person' reads as follows:

(1) Subject to this section, no person shall practise as an advocate and solicitor or do any act as an advocate and solicitor unless his name is on the Roll and he has a valid practising certificate authorising him to do the act; a person who is not so qualified is in this Act referred to as an 'unauthorised person'.

[51] Section 37(1) of the LPA on the other hand enumerates the kinds or types of conduct of such 'unauthorised person' which could lead to the commission of an offence.

[52] Section 37(1) reads:

(1) Any unauthorised person who —

(a) *acts as an advocate and solicitor or an agent for any party to proceedings or in any capacity*, other than as a party to an action in which he is himself a party, sues out any writ, summons or process, or commences, carries on, solicits or defends any action, suit or other proceedings in the name of any other person in any of the Courts in Malaysia or draws or prepares any instrument relating to any proceedings in any such Courts; or

(b) wilfully or falsely pretends to be, or takes or uses any name, title, addition or description implying that he is duly qualified or authorised to act as an advocate and solicitor, or that he is recognised by law as so qualified or authorised, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand five hundred ringgit or to imprisonment for a term not exceeding six months or to both. (Emphasis added.)

[53] Further, s 37(2) provides as follows:

(2) Without prejudice to the generality of subsection (1), any unauthorised person who either directly or indirectly —

(a) draws or prepares any document or instrument relating to any immovable property or to any legal proceedings or to any trust; or

(b) takes instructions for or draws or prepares any document on which to found or oppose a grant of probate or letters of administration; or

(c) draws or prepares any document or instrument relating to the incorporation or formation of a limited company; or

(d) on behalf of a claimant or person alleging himself to have a claim to a legal right writes, publishes or sends a letter or notice threatening legal proceedings other than a letter or notice that the matter will be handed to an advocate and solicitor for legal proceedings; or

(e) solicits the right to negotiate, or negotiate in any way for the settlement of, or settles, any claim arising out of personal injury or death and founded upon a legal right or otherwise, shall, unless he proves that the act was not done for or in expectation of any fee, gain or reward, be guilty of an offence under this subsection.

[54] Section 37(2A) reads:

> (2A) Any unauthorised person who does or *solicits the right to do any act which is customarily within the function or responsibility of an advocate and solicitor, including but not limited to advising on law*, whether Malaysian or otherwise, unless he proves that the act was not done for or in expectation of any fee, gain or reward, shall be guilty of an offence under this subsection. (Emphasis added.)

[55] Section 40 reads:

> Section 40 LPA No cost payable to unauthorised person
>
> (1) No costs in respect of anything done by an unauthorised person as an advocate and solicitor or in respect of any act which is an offence under section 37 or 39 shall be recoverable by any person in any action, suit or matter.
>
> (2) Any payment to an unauthorised person for anything done which is an offence under section 37 or 39 may be recovered in a Court of competent jurisdiction by the person who has paid the money.

[56] The question to be asked here is what was the exact nature or scope of work that the respondent undertook in consideration of his entitlement to the sum of RM240,000 as claimed?

[57] The facts reveal that Martech had appointed the respondent as a consultant in charge of their legal portfolio and the respondent was authorised to appoint external counsel and solicitors as and when required.

[58] The respondent was to be paid consultancy fees on a case to case basis for such matters. The respondent was appointed as a consultant in relation to a business consultancy agreement ('BCA') between Martech and E-pay which subsequently resulted in a dispute.

[59] The respondent had advised that E-pay had breached the BCA and recommended that a legal suit be initiated by Martech against E-pay for breach of contract and advised further that Martech had a 'strong chance' of recovering damages.

[60] With regard to the fees for the legal action against E-pay it was agreed that a sum of 10% of the subject matter of the suit or any settlement sum therefrom would be sufficient to cover legal fees and the respondent's own consultancy fee and a sum of RM20,000 would be paid to initiate the suit.

[61] It was also the arrangement that the respondent would apportion payment of legal fee due to counsel appointed on respondent's recommendations from the 10%.

[62] The respondent recommended the appointment of Messrs Keshminder as solicitors and the appellant as counsel to represent Martech in the legal suit to be initiated against E-pay.

[63] The appellant agreed that half of the 10% of the subject matter of the suit or any settlement sum would be paid towards the respondent's consultancy fee and the balance half share from the 10% would be paid towards the appellant's legal fee.

[64] When the E-pay suit was settled for the amount of RM4.8m the settlement sum was paid to the appellant and the appellant retained RM480,000 therefrom as part of the agreed legal fees (10%).

[65] The respondent then alleged that the appellant refused to pay the sum of RM240,000 to the respondent being the respondent's consultancy fees pursuant to the consultancy agreement with Martech.

Did the respondent act as an unauthorised person within the meaning of the LPA?

[66] The respondent claims to be entitled to half of 10% of the sum of RM480,000 ie RM240,000.

[67] This sum claimed is premised on a 'consultancy fee' pursuant to the respondent's agreement with Martech.

[68] This 'consultancy' included being in charge of handling their legal portfolio internally which included legal compliance with existing contracts including and agency agreement with E-pay.

[69] In other words, the respondent provided services to Martech with regard to both legal advice and legal compliance.

[70] The evidence also disclosed that the respondent had the authority to recommend and appoint external solicitors and counsel.

[71] The respondent also undertook advising and drafting of contracts for Martech as evident from draft versions of agreements sent in the form of Word document to the respondent for vetting.

[72] In addition, the respondent also had authority to recommend and appoint external solicitors and counsel.

[73] Draft versions of agreements were sent in Word format to the respondent for vetting which means that the respondent had undertaken the advising and drafting of contracts for Martech.

[74] The respondent further provided his advice in respect of the chances of the success of any legal action initiated by E-pay and concluded that the suit stood a high chance of being resolved in favour of Martech.

[75] The services offered to be performed and which were performed by the respondent can be summarised as follows:

(a) appointing the appellant to act for Martech;

(b) handling the internal legal portfolio for Martech which included legal compliance with existing contracts including the agency agreement with E-pay;

(c) recommending and appointing external solicitors and counsel to act for Martech;

(d) drafting and vetting contracts and authorisation documents for Martech; and

(e) providing advice on the chances of legal success and in advising to initiate legal action.

[76] Now it is clear from a plain reading of s 37 of the LPA that it is designed to impose restrictions upon an 'unauthorised person' performing services that only an advocate and solicitor can perform.

[77] A reading of the section as a whole will clearly indicate that the acts and services performed by the respondent as enumerated above, falls within the prohibition envisaged by s 37.

[78] In addition, s 40 of the LPA prohibits the payment of costs to an 'unauthorised person' and reads as follows:

> Section 40 LPA No cost payable to unauthorised person
>
> (1) No costs in respect of anything done by an unauthorised person as an advocate and solicitor or in respect of any act which is an offence under section 37 or 39 shall be recoverable by any person in any action, suit or matter.
>
> (2) Any payment to an unauthorised person for anything done which is an

offence under section 37 or 39 may be recovered in a Court of competent jurisdiction by the person who has paid the money.

[79] The decision of the Federal Court in *Darshan Singh Khaira v Majlis Peguam Malaysia* [2021] 5 MLJ 921; [2021] 10 CLJ 497 is also instructive. That case adopted Australian precedents which employed the acid test of whether a person has engaged in legal practice as follows:

> *If a person does a thing usually done by a solicitor, and does it in such a way as to lead to the reasonable inference that he is a solicitor — if he combines professing to be a solicitor with action usually taken by a solicitor — I think he then does act as a solicitor.*

The three ways in which a person could be said to be practising as a solicitor was summarised by the court as follows:

> Based upon the foregoing, I conclude that a person who is neither admitted to practise nor enrolled as a barrister and solicitor may 'act or practise as a solicitor' in any of the following ways:
>
> (1) *by doing something which, though not required to be done exclusively by a solicitor, is usually done by a solicitor and by doing it in such a way as to justify the reasonable inference that the person doing it is a solicitor. This is the test in Sanderson.*
>
> (2) *by doing something that is positively proscribed by the Act or by Rules of Court unless done by a duly qualified legal practitioner. Examples of such prohibitions in a statute are s 93 and s 111 of the LPPA. (Legal Profession Practice Act 1958).*
>
> (3) *by doing something which, in order that the public may be adequately protected, is required to be done only by those who have the necessary training and expertise in the law. For present purposes, it is unnecessary to go beyond the example of the giving of legal advice as part of a course of conduct and for reward.*

[22] In conclusion, JD Phillips J observed:

> *In my opinion, the giving of legal advice, at least as part of a course of conduct and for reward, can properly be said to lie at or near the very centre of the practice of the law, and hence of the notion of acting or practising as a solicitor, which is itself central to s 90* ... It is thus something required to be undertaken only by the legally qualified, and not by those not properly qualified.
>
> ...
>
> [23] *Daubney J alluded to each of the following matters which can be said to lie near the very centre of the practice of litigation law:*
>
> (a) *advising parties to litigation in respect of matters of law and procedur*e;
>
> (b) assisting parties to litigation in the preparation of cases for litigation;
>
> (c) drafting court documents on behalf of parties to litigation;

(d) *drafting legal correspondence* on behalf of parties to litigation; and

(e) purporting to act as a party's agent in at least one piece of litigation.

On our part, we find no reason to think that the matters listed above are not matters which lie at the heart of the practice of law. (Emphasis added.)

[80] Having applied the tests described above to the factual matrix of the instant case, we are of the view that the acts and services performed by the respondent are squarely within the description of a person engaging in legal practice.

[81] On the other hand, the finding of the High Court was that the respondent was not in breach of s 37 of the LPA as the respondent acted as an 'in-house legal counsel' to Martech and was therefore permitted to exercise the functions he did.

[82] The High Court had therefore recognised that the respondent was in fact providing legal advice and services but was not caught by the prohibition in s 37 of the LPA as he was in effect operating as 'in-house counsel'.

[83] However, the respondent here was not employed and acting solely for Martech as a full-time paid employee.

[84] The learned High Court judge had therefore further erred in failing to appreciate that only the actions of a fully paid 'in-house' counsel was exempted under s 38(1)(d) of the LPA.

[85] In this regard, it is material to note that there were several aspects of the respondent's relationship with Martech which differed considerably from that of a genuine in-house counsel.

[86] First, the evidence revealed that,

(a) he was not an employee of Martech;

(b) he was appointed as a consultant for a single contract and on a case-by-case basis and not in respect of all legal matters;

(c) he did not have a written contract of employment with Martech;

(d) he was paid a fee on the contingency of there being a successful outcome and not on a fixed fee basis; and

(e) he could appoint lawyers and decide on allocation of fees dependent upon the outcome of litigation.

[87] Secondly, and with the greatest of respect, the interpretation employed by the learned High Court judge consequent upon her finding that what the respondent did was akin to the work of in-house legal counsel, if followed, would have the effect of circumventing the prohibitions, restrictions and the protection afforded by s 37 of the LPA by the artificial utilisation of a 'consultancy' arrangement.

[88] Thirdly, employing a purposive interpretation of s 37, it can hardly be denied that the section was meant for the protection of an unsuspecting public against those who engage in the practice of providing legal services but without the safeguards contained within the LPA.

[89] Drawing all of the above threads together, we are therefore of the view that the claim of the respondent ran afoul of ss 37 and 40 of the LPA.

Whether or not the claim as pleaded is a touting arrangement which is void and unenforceable under s 24 of the Contracts Act 1950?

[90] The prohibition against touting is contained in r 51 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Practice and Etiquette Rules') and reads as follows:

> Rule 51 Advocate and solicitor not to do or cause touting.
>
> An advocate and solicitor shall not do or cause or allow to be done, anything for the purpose of touting directly or indirectly, or which is calculated to suggest that it is done for that purpose.

[91] There appears to be no definition of the term 'touting' in the Rules but there is a body of case law helpfully cited by learned counsel for the Malaysian Bar that gives some indication of what the term entails.

[92] The case of *Balakrishnan a/l Devaraj v Patwant Singh a/l Niranjan Singh and anor* [2004] MLJU 724; [2005] 4 CLJ 210 in quoting the case of *Re A Solicitor* [1945] 1 All ER 445, held as follows:

> 'Touting' for clients is, like advertising, fundamentally inconsistent with the interest of the public and with the honour of the profession. The function of a solicitor is to advise or negotiate or fight for a client, but only if retained. The client may seek him, but he must not seek the client And this rule of conduct must be made a reality, and not evaded by the subterfuge of getting some laymen to do the touting for him.

[93] Although made in the context of accident claims where the danger was expressed to be prevalent, it applies across the board.

[94] Another case cited by learned counsel for the Bar particularly relevant

here is the decision of this court in the case of *Lee Kuang Guat (suing as the father of the deceased, Lee Chu Ling) v Chiang Woei Chien (practicing as Chiang Chambers, Advocates and Solicitors)* [2021] 3 MLJ 505; [2021] 3 CLJ 237 (CA), which held at para [13] as follows:

> In this regard, we note that the Malaysian Bar has taken upon itself to express the view that touting is a menace. In a press release by the Malaysian Bar dated 27 August 2019 under the heading *'Stricter Enforcement Against Touting', the Malaysian Bar described 'touts' as persons who receive commissions from law firms in return for securing clients for the law firms'*. According to the press release, 'Touting is abhorrent to the legal profession and detrimental to the public interest, and the Malaysian Bar views touting seriously'. (Emphasis added.)

[95] Yet another case cited by learned counsel for the Bar is the Indian case of *In Re: Phool Din And Ors v Unknowns* AIR 1952 ALL 491 cited and followed in the case of *Balakrishnan a/l Devaraj v Patwant Singh a/l Niranjan Singh and anor* [2004] MLJU 724, to the following effect:

> (12.) *Two essential ingredients for a person to be a tout are necessary: (1) he must be engaged in the procurement of a legal practitioner's employment, and (2) in consideration of some remuneration moving from the legal practitioners.* If any of these elements is absent, he is not a tout. A person is not a tout if he gives gratuitous advice to a litigant to engage a particular lawyer, or gratuitously procures the employment of a lawyer. It is only when he charges a remuneration from a lawyer for this purpose that he falls in the definition of a tout**.**
>
> ...
>
> (15.) Legal profession is one of the honourable professions. *Every litigant should be at liberty to find out for himself as to which lawyer will render him the best service.*
>
> ...
>
> If he engages a lawyer through a tout, the *tout is likely to take him to a lawyer who gives him the largest remuneration. A tout would not be concerned with affording the best service to a litigant.* The litigant may thus be deprived of the best service. The system of totuism is bound to corrupt the legal profession. *A most talented lawyer may not be able to get work, because he does not stoop down to accent an engagement through a tout: but a lawyer who has no scruples to accept employment through a tout may have large work*, because he gives a large share of his remuneration to the tout. The administration of justice itself may be affected by permitting toutism, as the courts may not have the advantage of the services of the best lawyers before them. We have no doubt in our mind that it is not in public interest to permit toutism. (Emphasis added.)

[96] Based upon the principles derived from the above case law, the arrangement entered into by the respondent where he would receive a 'consultancy fee' of half of the fees recovered from the appellant would fall under the definition of 'touting'.

[97] In plain and simple terms, what the respondent did was to identify and enter into an arrangement with a lawyer where the latter would make remuneration to him in exchange for referring the case to him. There was accordingly no attempt to secure the services of a lawyer on the basis of competence or price competitiveness but purely on the basis of a favourable remuneration for the respondent.

[98] This fell squarely within the acts of touting as described in *Balakrishnan a/l Devaraj*.

[99] In this regard, it is also pertinent to note with interest that both the sessions court and the High Court had recognised that the respondent had effectively entered into a touting arrangement.

[100] The following excerpt from the grounds of judgment of the High Court neatly summarised the findings of the sessions court and clearly reflected that the respondent had entered into a touting arrangement:

> Martech had acted on the advice of the respondent and agreed to appoint the respondent as consultant for the E-pay suit where the respondent had appointed and arranged for Messrs Keshminder & Associates as solicitors and the appellant as counsel for the civil suit against E-pay; ...
>
> ...
>
> The respondent and Martech then agreed that 10% from the settlement amount is for legal fees and the respondent's consultancy fees
>
> ...
>
> Martech had acted on the advice of the respondent and agreed to appoint the respondent as consultant for the E-pay suit where the respondent had appointed and arranged for Messrs Keshminder & Associates as solicitors and the appellant as counsel for the civil suit against E-pay

[101] The High Court itself held:

> This court finds that there was indeed an agreement between the appellant and the defendant to evenly share the 10% of the successful settlement sum.

[102] By all accounts, what the respondent seeks to now recover from the appellant represents his fee in exchange for him appointing the appellant to act as the lawyer for Martech.

[103] Thus, any which way that one looks at it, this was a 'touting' arrangement which is prohibited by r 51 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Practice and Etiquette Rules') which is prohibited. The decision of the sessions court and upheld by the High Court which ruled that there was no contravention of ss 37 and 40 of the LPA was in our view, a

misdirection warranting appellate intervention.

DECISION

[104] Therefore, as a matter of public policy, such practices ought to be prohibited as falling afoul of s 24 of the Contracts Act 1950 and therefore barring recovery of any sum by the respondent.

[105] In the light of our analysis and findings above, we have come to the unanimous decision that this appeal is allowed. Accordingly, the decision of the High Court is set aside.

[106] In so far as consequential orders are concerned, it is necessary to mention that we had earlier given leave for Allen David Martinez (formally trading under the name and style of Martech Consultants) to intervene in the appeal proceedings albeit only in respect of the issue of consequential orders to be made in the event this court allows the appellant's appeal.

[107] Accordingly, having allowed this appeal, we invited counsel for the applicant, Allen David Martinez, to address us on the subject of consequential orders to be made.

[108] Counsel for Allen David Martinez submitted that since we allowed the appeal, the said sum ought to be refunded to the appellant, Bhavanash Sharma.

[109] Learned counsel for the respondent, on the other hand and in response to the submission for the applicant, submitted that since the arrangement was held to be illegal, refunding the money would be amount to a windfall for the applicant and tantamount to getting a prize for engaging in an illegal transaction.

[110] Learned counsel for the appellant, unsurprisingly, argued that the subject matter sum ought to be refunded to the appellant.

[111] Learned counsel for the *amicus curiae,* the Malaysian Bar, submitted that as it is a matter of principle, it would not be right to refund the said sum to the appellant as it would establish a bad precedent.

[112] After hearing respective parties submissions, in respect of the consequential orders, we decided as follows.

CONSEQUENTIAL ORDERS

[113] On the facts of the case, it is clear that the appellant being an advocate and solicitor, was aware that his appointment was on the sole basis that he agreed to share half of the 10% recovered with the respondent.

[114] We are therefore attracted to the argument raised by the Malaysian Bar that as the appellant had been in *pari delicto,* a balance according to the notions of equity and fairness has to be struck between the parties.

[115] In the circumstances, although the appeal is allowed, the appropriate consequential orders which we make is as follows:

(a) we order that the sum of RM240,000 plus all interest and the costs totaling the sum of RM309,325 held in the clients-account of the firm of Messrs Dinesh Ratnarajah Partnership (solicitors for the respondent) pursuant to the order of the High Court dated 10 August 2023, together with all interest accrued thereupon, be paid to Messrs Kumar Partnership as the solicitors for the intervener, Allen David Martinez (formerly trading under the name and style of Martech Consultants) within seven days from the date of service of the sealed order of this court on the firm of Messrs Dinesh Ratnarajah Partnership;

(b) we order that there be no costs in respect of this appeal; and

(c) we hereby set aside all previous orders of costs made by the sessions court and the High Court.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh